SUPREME COURT, U. S.

FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 768

CROLL-REYNOLDS CO., INC., ET AL., *Petitioners,*

v.

PERINI-LEAVELL-JONES-VINELL, ET AL., *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The petition seeks a review by this Court of the concurrent findings of the District Court and Court of Appeals, that under the terms of agreement between the United States Government and respondents, and the circumstances of purchase, installation and use of certain equipment pursuant to that agreement, the Government authorized and consented to use of the equipment which is charged by petitioners to be an infringement of United States Letters Patent Nos. 3,108,448 and 3,150,496. (Pet. App. 1a-10a).

Upon those findings, the District Court dismissed the petitioners' complaint for patent infringement for lack of jurisdiction under the provisions of Title 28 United States Code, Section 1498. (Pet. App. 12a). The Court of Appeals for the Fifth Circuit affirmed on the same ground (Pet. App. 5a).

Petitioners' statement on page 7 of the petition that they are indifferent to what ruling this Court makes on the question presented does not instill a feeling of confidence either in the importance of the question or in the petitioners' intent to argue the matter in a manner befitting the Court.

The question presented for review, although incomplete and inaccurate in several respects, in itself demonstrates that the issues of this case are peculiar to the facts and circumstances of the instant situation. No rule of law of general applicability is involved.

I. There is No Conflict

There is no conflict with the decision of another District Court or Court of Appeals as to the matter in question. Petitioners cite the decision in *Wood* v. *Atlantic Gulf and Pacific Co.*, 296 Fed. 718 (S. D. Ala., 1924) as a conflicting decision. That district court decision was not appealed and is from the same circuit as is the present case. The *Wood* case in any event is distinguishable in its finding that the use accused as patent infringement was neither approved by, or known to, the Government. Both Government approval and knowledge, as well as Government cooperation in setting up and operating the equipment, are present here.

Petitioners also cite *Drexler* v. *Koza,* 88 F. Supp. 298 (W. D. Pa., 1950) and *Bereslavsky* v. *Esso Standard Oil Co.*, 175 F. 2d 148 (4th Cir., 1949) as being in conflict with the holdings of the court below. Both of these decisions found authorization and consent by the acceptance by the Government of products made for it. The statements in these decisions distinguishing *Wood* v. *Atlantic Gulf and Pacific Co.*, supra, were not necessary to the results reached and do not reach the matter decided in the instant case.

In *Consolidated Vacuum Corporation* v. *Machine Dynamics,* 230 F. Supp. 70 (S.D. Calif., 1964), the defendant was the seller of accused testing equipment to parties making articles sold to the Government. There is no statement that the testing equipment was known to, approved by, or necessary to the making of the articles. Consequently, no authorization or consent was found. The decision in *Stelma Incorporated* v. *Bridge Electronics,* 300 F. 2d 761 (3rd Cir., 1962) concerned products sold to the Government, and both authorization and consent were found. The foregoing decisions and the *Bereslavsky* v. *Esso Standard Oil Co.* decision, supra, were cited by the Court of Appeals for the rules that the Court of Claims has exclusive jurisdiction in such cases, and that authorization or consent may be express or implied. The decisions in other respects deal with different facts and are not in any respect inconsistent with the holdings of the courts below.

A conflict with the decisions of the courts below does not exist. The only decision on facts akin to those of the present case is *Evans* v. *McDonnell Aircraft Corp.,* 270 F. Supp. 778 (E.D. Mo., 1967), which is consistent with the rulings of the courts below.

II. The Rulings Below Were Required By The Facts Found

In addition to the statement of facts set out in the petitioners' question presented for review, the record shows the following:

The Government's authorized representatives knew of, and approved the use of, the accused cooling methods and equipment prior to the purchase by the contractor of the

cooling equipment necessary to carry out the method. (R. 36, 65, 103-111). The equipment was placed and erected on Government property, is being used on Government property, and is periodically inspected by Government representatives. (R. 36, 38, 46, 57). Government representatives assisted in working out problems in setting up and operating the equipment (R. 37). The sole use of the cooling equipment and methods has been on Government property to provide concrete for the Government (R. 43).

Payments were made by the Government to the respondent contractors on their estimates and proposals for the cooling equipment under a provision of the Government contract stating:

> "If the Contracting Officer finds that said construction plant, material, equipment and the mobilization and preparatory work performance are suitable *and necessary to the efficient prosecution of the contract* and that the said preparatory work has been done with proper economy and efficiency, payment, less the prescribed retained percentage, will be made therefor to the Contractor." (R. 94, 95). [Emphasis added]

Express authorization and consent by the Government is provided by the Government contract with respondents which states in part that authorization and consent is given for "use and manufacture . . . of any invention described and covered by a patent of the United States . . . (ii) utilized in the machinery, tools, or methods the use of which necessarily results from compliance by the Contractor . . . with (a) specifications or written provisions . . . forming a part of this contract . . . . " (R. 85).

The payments made by the Government on respondents' submission of estimates and proposals for cooling equip-

ment required the determination by the Government that the equipment and its use was "suitable and necessary to the efficient prosecution of the contract." (R. 94, 95). That determination brought the accused use of the equipment within the terms of the express authorization and consent clause of the contract.

On these facts, including the Government's knowledge, cooperation in setting up and operating the equipment, control over the place of use, and determination of necessity, there can be no doubt that the courts below correctly found authorization or consent existed as a matter of fact. The complaint was properly dismissed under Title 28, United States Code, Section 1498, whether authorization or consent by the Government is determined to be express or implied.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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